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The Global Market and Human Rights: Trading Away the Human Rights Principle

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THE GLOBAL MARKET AND HUMAN RIGHTS: TRADING AWAY THE HUMAN RIGHTS PRINCIPLE

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I. INTRODUCTION

The task set for this Article is to consider the impact which the globalization of markets may have on the effectiveness of international human rights law. But what *is* globalization? By comparison, the term "international human rights" is relatively easier to categorize,[1] and in this Article shall be used principally in the positive sense to denote the basic legal rights enumerated in the first twenty articles of the Universal

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1. In saying this, I do not mean to suggest that the concept of international human rights is simple, uncontroversial, and has precise limits—that is far from the case. *See generally* Joy Gordon, *The Concept of Human Rights: The History and Meaning of its Politicization,* 23 BROOK. J. INT'L L. 689 (1998) (reviewing the concept, and asserting its oddness, political history and inconsistency); Anthony D'Amato, *The Concept of Human Rights in International Law,* 82 COLUM. L. REV. 1110 (1982). Commentators have objected to the uncertain boundaries of the concept, as well as to inherent gender and culture biases. *See, e.g.,* Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control,* 78 AM. J. INT'L L. 607, 607 (1984) (criticizing the "haphazard" expansion of the term); Celina Romany, *Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law,* 6 HARV. HUM. RTS. J. 87, 88 (1993) (arguing that the concept of human rights rests on discredited public/private distinction); Sompong Sucharitkul, *A Multi-Dimensional Concept of Human Rights in International Law,* 62 NOTRE DAME L. REV. 305, 305 (1987) (discussing European bias of basic human rights instruments). I mean only that it is relatively easier to have some assurance that we know what the term is referring to in discourse, at least when employed in a positive sense, in comparison to the term "globalization," as I discuss below. *See infra* note 4 and accompanying text.

Declaration of Human Rights.[2] Such rights include the right to life, liberty and the security of one's person; the right to freedom from slavery or servitude; the right to freedom from torture or cruel, inhuman or degrading treatment; the right to equality before the law; and the right to own property.[3] But globalization? As many commentators have pointed out, "globalization" is a rather vague, "loose and overstretched" term which can be used to mean many things or, perhaps, nothing at all.[4] And why think about the impact of *globalization,* in particular the globalization of *markets*, on human rights law, rather than the impact of some other international trend? Is it

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2. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., pt. I, 183d plen. mtg., U.N. Doc. A/810 (1948) [hereinafter UDHR]. An alternative list of "core" rights might consist, for example, of the rights listed in Section 702 of the Restatement. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1986) (customary international law recognizes prohibitions against, *inter alia,* genocide, slavery, murder or disappearance of individuals, torture, prolonged arbitrary detention, and systematic racial discrimination). International human rights includes other rights, of course, such as those enumerated in the two U.N. covenants, often referred to as "second-generation" rights. These are set forth in and enforced through other instruments and mechanisms, such as regional human rights conventions, specialized tribunals, national courts, and state initiatives such as international diplomacy, and economic coercion.

The term "international human rights" can also be used in a normative sense to refer to the bundle of related concepts in moral and political theory used to justify positive legal rights, such as natural law, natural rights and moral rights. This Article shall endeavor in its use of the term to distinguish the positive law from its normative justification. *See infra* notes 74-82 and accompanying text. The term can also be used in a historical or sociological sense with reference to the post-war human rights movement, and in an aspirational sense as representing an ideal of human dignity protected through law. *See generally* Burns Weston, *Human Rights, in* 20 NEW ENCYCLOPAEDIA BRITANNICA (15th ed. 1993).

3. UDHR, *supra* note 2, arts. 3-5, 7, 17.

4. Rudolph Dolzer, *Global Environmental Issues: The Genuine Area of Globalization,* 7 J. TRANSNAT'L L. & POL'Y 157, 157 (1998) ("Behind the loose and overstretched notion of globalization are both quantitatively and qualitatively different phenomena in economic, cultural, and environmental international relations."). *See also* Alfred C. Aman, Jr., *Introduction,* 1 IND. J. GLOBAL LEGAL STUD. 1, 1 (1993); S. Tamer Cavusgil, *Globalization of Markets and its Impact on Domestic Institutions,* 1 IND. J. GLOBAL LEGAL STUD. 83, 84 (1993); Jost Delbrück, *Globalization of Law, Politics, and Markets—Implications for Domestic Law—A European Perspective,* 1 IND. J. GLOBAL LEGAL STUD. 9, 9-10 (1993); Miguel de la Madrid H., *National Sovereignty and Globalization,* 19 HOUS. J. INT'L L. 553, 555-60 (1997); Alberto Tita, *Globalization: A New Political and Economic Space Requiring Supranational Governance,* 32 J. WORLD TRADE 47 (1998). For a thorough review of the history and uses of the term, see Tahirih V. Lee, *Swallowing the Dragon? Some Directions for Research on Globalization Theory and Legal and Economic Restructuring in East Asia,* AM. J. COMP. L. (forthcoming 1999).

simply because we presume that "human rights," being in some non-trivial way about "human beings," are therefore likely to be influenced by any important change in human self-understanding and social activity, such as market globalization may represent? Or do we intuit that there is something particular about market globalization which leads us to suspect that it will have a unique and important impact on the effectiveness of human rights law, one that is worth examining carefully?

Taking the last question first, this Article begins with the premise that something unique and important with respect to human rights *is* in fact going on in the process of globalization, in particular when one distinguishes between the economic facts of market globalization and its regulatory infrastructure.[5] While market globalization may represent in some aspects a unique opportunity for human rights law, the globalization of the market economy may also pose a threat to the continued effectiveness of human rights law, just as the rise of the market economy itself has been blamed for leading to conditions requiring the formal development of human rights law.[6] The regulatory framework which international economic law provides for globalization operates according to a view of human nature, human values and moral decision-making fundamentally at odds with the view of human nature, human values and moral decision-making which underlies international human rights law. The human rights movement could thus find in market globalization the ultimate victory of a regulatory system that, by nature and operation, cannot properly take into account what the human rights movement holds most dear: that underlying positive human rights laws are moral

5. *See infra* notes 22-25 and accompanying text.

6. "Modern markets also created a whole new range of threats to human dignity and thus were one of the principal sources of the need and demand for human rights." JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 64 (1989). It may be, for example, that the globalization of markets erodes the social and normative preconditions for human rights protection, as well as for the market itself. Hausman & McPherson point out that core trade and economic values such as economic efficiency depend upon ethical values which paradoxically may be undermined by market economies. *See* Daniel M. Hausman & Michael S. McPherson, *Taking Ethics Seriously: Economics and Contemporary Moral Philosophy*, 31 J. ECON. LITERATURE 671 (1993). Hausman & McPherson list honesty, trust and goodwill as three values critical to the efficient function of markets, which may in fact be undermined by appeals to rational self-interest, at least in certain forms. *Id.* at 673.

entitlements that ground moral, political, and legal claims of special force,[7] claims which must be morally and legally prior to society and the state.[8] They are "[u]nalienable."[9] It is this inalienability and priority of human rights which this Article refers to as the "human rights principle" justifying international human rights law, and it is this principle which is at risk of being "traded away," if you will, when human rights laws and the claims and values they presuppose, come into conflict with trade law and trade values in the new tribunals of globalization, in particular the World Trade Organization's (WTO) dispute settlement mechanism.[10]

In proposing that the effects of market globalization on human rights law be analyzed as a normative conflict in WTO dispute resolution, I am suggesting that this sort of problem is in fact a problem of justice.[11] In other words, the legal and institutional mechanisms created to facilitate and respond to market globalization, and the legal and institutional mechanisms created to define and protect human rights, both involve

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7. DONNELLY, *supra* note 6, at 9.

8. *Id.* at 70.

9. *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776).

10. Understanding on Rules and Procedures Governing the Settlement of Disputes, Dec. 15, 1993, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 33 I.L.M. 112 (1994) [hereinafter DSU]; *See generally* Ernst-Ulrich Petersmann, *The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System Since 1948,* 31 COMMON MKT. L. REV. 1157 (1994) (reviewing the structure and function of the WTO dispute settlement process).

11. Globalization has a recognized normative aspect. *See* Alex Y. Seita, *Globalization and the Convergence of Values,* 30 CORNELL INT'L L.J. 429, 431 (1997) ("globalization is an important source of common economic and political values for humanity"); Delbrück, *supra* note 4, at 11 (the term globalization itself is often used as a normative term, in that it presupposes a value judgement "that the common good is to be served by measures that are to be subsumed under the notion of globalization"). In particular, the conflicts which globalization can engender between trade law and other bodies of law, such as environmental law and labor law are inescapably normative. *See* Philip M. Nichols, *Trade Without Values,* 90 NW. U. L. REV. 658, 672-73, 680 (1996). On the applicability of normative theory to international relations, see CHARLES R. BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS 5 (1979); STANLEY HOFFMANN, DUTIES BEYOND BORDERS: ON THE LIMITS AND POSSIBILITIES OF ETHICAL INTERNATIONAL POLITICS 1 (1981); Anthony D'Amato, *International Law and Rawls' Theory of Justice,* 5 DENV. J. INT'L L. & POL'Y 525, 525 (1975); Frank J. Garcia, *Trade and Justice: Linking the Trade Linkage Debates,* 19 U. PA. J. INT'L ECON. L. 391, 395-406 (1998); Alfred P. Rubin, *Political Theory and International Relations,* 47 U. CHI. L. REV. 403 (1980) (review of BEITZ 1979).

public order decisions as to the allocation of social benefits and burdens, and the correction of improper gain.[12] The fundamental normative goal of every such public order decision is justice, which is to say that such decisions are to be made in accordance with, and their outcomes must reflect, our basic moral and political principles.[13]

Considered broadly, globalization has the potential to promote broad, if not universal, international consensus on the basic principles of Western liberalism: free markets, democratic government, and human rights.[14] However, within this broadly framed liberalism the various components can themselves come into conflict through the very process of globalization which brings them into the ascendant.[15] Moreover, international problems of justice such as the market-globalization/human rights conflict present unique difficulties, in that they reflect a central feature, if not defect, of the international governance system, namely that the pursuit of global justice is splintered into a myriad of treaties and institutions, in this case into two distinct regimes, one concerned with economic justice and one with human dignity. Therefore, the inquiry into the effects of market globalization on human rights law becomes an inquiry into how the economic facts and regulatory infrastructure of globalization enhance, or interfere with, the contributions which international human rights law seeks to

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12. This is Aristotle's classic subdivision of Plato's general concept of justice as Right Order into its main constituent parts, which distinction continues in influence to the present day. *See* ARISTOTLE, NICHOMACHEAN ETHICS, bk. V., chs. 2, 4, *in* INTRODUCTION TO ARISTOTLE 400, 404-07 (Richard McKeon ed., 1947); Alan Ryan, *Introduction*, *in* JUSTICE 1, 9 (Alan Ryan ed., 1993) (citing the continuing influence of this categorization).

13. *See* Garcia, *supra* note 11, at 395-96.

14. *See* Seita, *supra* note 11, at 431.

15. Commentators recognize the inevitability of conflict between the various elements of a globalized liberalism, such as free markets and human rights. *See, e.g.*, Seita, *supra* note 11, at 470 ("[T]he basic values that globalization spreads can sometimes be at odds with each other and with other important values."); Nichols, *supra* note 11, at 672-73 ("At any given point in time a society will possess more than one value. These values may, in fact, conflict with one another. Thus, it is possible for a country to hold a value of enhancing wealth through international trade and at the same time hold values that conflict with the precepts of free trade.") (footnotes omitted). Moreover, where a market is dominated by ethnic minorities, globalization may lead an anti-democratic and anti-market backlash by impoverished ethnic majorities, with disasterous human rights consequences. *See generally* Amy L. Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 YALE L.J. 1 (1998).

make towards the attainment of justice. The conflicts engendered by this bifurcation, particularly in view of the preeminence of international economic law,[16] must be addressed in order that we may avoid undoing with the tools of economic liberal justice what we have accomplished with the tools of rights-based liberal justice.

After a brief discussion of globalization introducing a distinction between "transactional" and "regulatory" globalization and their differing impact on human rights, this Article turns in Part III to a discussion of the normative conflict underlying globalization/human rights disputes, which this Article characterizes as reflecting the conflict between consequentialist and deontological forms of moral decision-making and justification. This Article then turns to an analysis of the disposition of globalization/human rights disputes in the WTO, illustrating how the trade-oriented nature of such an institution, coupled with the underlying normative conflict in such disputes, work to disadvantage laws based on human rights claims in that forum. Finally, this Article offers some suggestions as to how WTO doctrine could be amended or interpreted so as to resolve trade-human rights disputes in a manner more in keeping with the human rights principle.

II. GLOBALIZATION

As was indicated above, the term "globalization" can have many meanings.[17] Taken most broadly, globalization represents the sum total of political, social, economic, legal and symbolic processes rendering the division of the globe into national boundaries increasingly less important for the purpose of individual meaning and social decision.[18] "Globalization" thus in fact contains many smaller "globalizations," which

16. *See, e.g.*, Joel P. Trachtman, *The International Economic Law Revolution*, 17 U. PA. J. INT'L ECON. L. 33, 35-36 (1996).

17. *See supra* note 4 and works cited therein.

18. *See, e.g.*, Seita, *supra* note 11, at 429 ("Globalization . . . is a multifaceted concept encompassing a wide range of seemingly disparate processes, activities, and conditions . . . connected together by one common theme: what is geographically meaningful now transcends national boundaries and is expanding to cover the entire planet. Globalization has led to an awareness that international issues, not just domestic ones, matter."); Aman, *supra* note 4, at 1-2 ("In our view, 'globalization' refers to complex, dynamic legal and social processes . . . . Today, the line between domestic and international is largely illusory.").

can both "reinforce *and clash with* one another."[19]

Globalization is often defined principally in economic terms, namely as the globalization of markets.[20] Since we are also concerned in this context with the globalization of markets, a good starting point is to begin with the idea of a market. In this Article, the term "market" shall be used in the rather traditional sense of a series or system of private interactions involving voluntary exchanges of goods, services, labor and capital, the four basic economic factors of production.[21] What we are concerned with, then, is to understand what is meant by the "globalization" of mechanisms for the private exchange of the factors of production, and the effects of this globalization on human rights.

In considering the globalization of the market, one can distinguish between the geographic facts of globalization, and the regulatory predicates and consequences of such globalization. One definition of market globalization, which this Article terms "transactional globalization," views the globalization of markets as an increase in the number of transactions involving goods, services, labor and capital which cross national boundaries, such that they come to resemble in operation a single market spanning the globe.[22] This definition assumes that there has always been a certain amount of transboundary economic activity, but that such activity is increasing both in scope and scale such as to warrant the tag "globalization," thus saying in essence that globalization is a quantitative rather than a qualitative change.[23]

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19. Seita, *supra* note 11, at 429 (emphasis added).

20. *See* Seita, *supra* note 11, at 429-30. However, other commentators point out that globalization involves significant non-economic processes, and Seita himself points out that "[d]emocracy and human rights are, for example, as much a part of globalization as are free market principles." Aman, *supra* note 4, at 1; Delbrück, *supra* note 4, at 9-10; Seita, *supra* note 11, at 429.

21. I will not be addressing "markets" in the specialized or analogic sense, as the term is employed in analyzing such phenomena as the "market for control" in private firms, or the "regulatory market."

22. *See, e.g.*, Seita, *supra* note 11, at 439 (discussing economic globalization as the "expansion of markets for goods, services, financial capital, and intellectual property"); Cavusgil, *supra* note 4, at 83 ("Globalization of markets involves the growing interdependency among the economies of the world; multinational nature of sourcing, manufacturing, trading, and investment activities; increasing frequency of cross-border transactions and financing; and heightened intensity of competition among a larger number of players.").

23. *See* Dolzer, *supra* note 4, at 157 (stating that "[i]n the economic sphere,

This common approach to defining economic globalization, however, represents only one aspect of economic globalization. Another definition, which shall be termed "regulatory globalization," includes the quantitative changes identified in transactional globalization, but emphasizes a qualitative change in the nature of our regulation of markets. In particular, regulatory globalization focuses on the complex social processes which have led to the regulation of markets for goods, labor, capital and services at new levels, levels which require formalized interstate cooperation through new and powerful institutions like the WTO, and which may, in certain cases, transcend nation-state control to a significant degree, as in the case of the European Community.[24]

The question before us, then, can be framed as an inquiry into the ways in which each of these "market globalizations" affects the vitality and effectiveness of human rights law. Before turning to the possible adverse effects of regulatory globalization on human rights law, which is the principal focus of this Article, a few words about the effects of transactional globalization, and the *positive* effects of regulatory globalization, are in order. To begin with, globalization of both types may in certain respects represent an unparalleled opportunity for enhancing the exercise and protection of human rights. For example, transactional globalization can contribute directly to the enjoyment of economic rights, due to the relationship between economic activity and the human freedom and dignity we express in our decisions as producers and consumers.[25] Indirectly, transactional globalization may enhance the effectiveness of human rights law by contributing to the attainment of the economic preconditions for socioeconomic rights through

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globalization is not a novel phenomenon, but relates to the *pace* of change that has increased dramatically") (emphasis added).

24. *See* Trachtman, *supra* note 16, at 46-55 (reviewing history of regulatory changes in international economic law); Delbrück, *supra* note 4, at 10-11, 17 (explaining globalization as signifying changes in the locus of regulation); Aman, *supra* note 4, at 2 (emphasizing change in dynamics of law formation wrought by globalization).

25. As the trade liberalization attendant to globalization reduces governmental barriers to private economic decision-making, individuals have an increased scope for realizing such economic rights. *See* Robert W. McGee, *The Fatal Flaw in NAFTA, GATT and All Other Trade Agreements,* 14 NW. J. INT'L L. & BUS. 549, 560-61 (1994) (criticizing protectionist unfair-trade remedies as impermissibly restricting consumer rights).

the significant increases in global welfare which trade theory predicts should follow such globalization.[26] Furthermore, transactional globalization can contribute to the enforcement of human rights, through the effects which increased contact between the citizens of oppressive regimes and the citizens and products of rights-protective regimes may have on the continuing viability of oppressive regimes.[27] Participation in the market itself may increase domestic pressure for increased political and social rights.[28] Finally, there is the possibility, at least, that the significant economic power unleashed through transactional globalization and the interdependent economies it encourages, might be marshaled in the form of economic sanctions against human rights violations.[29]

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26. Transactional globalization represents at least an apparent vindication on a global level of basic free trade principles. This should mean that, as imperfections in the market are worked out and the regulatory system strengthened, we should be poised to witness significant improvements in global welfare, as individuals gain in economic liberty and material prosperity as a result of the operation of free trade principles globally. *See* Nichols, *supra* note 11, at 661-67 (summarizing the contributions which free trade can make to human well-being). Such improvements enhance the conditions for the attainment of socioeconomic rights, such as the right to employment and the right to a decent standard of living, and the conditions for human rights protection generally. *See* UDHR, *supra* note 2, art. 22 ("Everyone, as a member of society, . . . is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each state, of the economic, social and cultural rights indispensable for his dignity . . . .").

27. The revolution in information and communications technologies involved in globalization has brought people in rights-protective regimes face to face with human rights crises thousands of miles away. *See* Seita, *supra* note 11, at 455-60 (surveying links between communication technology and democracy and human rights). Globalization can thus make it more difficult for persistent violators to maintain the cloak of secrecy and deniability. Also, oppressive regimes are finding it increasingly difficult to control the access to and spread of "subversive" information and ideas in the information age. *See, e.g.*, Upendra Baxi, *Voices of Suffering and the Future of Human Rights*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 125, 160-61 (citing the use of "cyberspace solidarity").

28. Liberalization in economics may lead to liberalization in politics as well, as the economic liberalization required by globalization has a favorable spillover effect on liberalization of domestic policies on speech, democratic participation, etc. *See* Seita, *supra* note 11, at 453-54 (reviewing indirect impact of transactional globalization on democratic and human rights values).

29. *See* Philip Alston, *International Trade as an Instrument of Positive Human Rights Policy*, 4 HUM. RTS. Q. 155, 168-70 (1982); Robert W. McGee, *Trade Embargoes, Sanctions and Blockades: Some Overlooked Human Rights Issues*, 32 J. WORLD TRADE 139, 142 (1998); Patricia Stirling, *The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization*, 11 AM. U. J. INT'L L. & POL'Y 1, 42-45 (1996). On the

Regulatory globalization can also have several positive effects on human rights. First, there is the fact that globalization has been facilitated and managed by an increase in the rule of law in international economic relations.[30] Therefore, since a commitment to the rule of law is integral to human rights law as well as the international economic law system, regulatory globalization has contributed in a significant way towards establishing a key regulatory goal of human rights law as well.

Second, there has been some recognition at the regulatory level of the importance of considering human rights in connection with the operation of trade and integration rules and systems. At the mulilateral level, for example, both GATT 1947 and GATT 1994[31] contain an exception to the most-favored-nation (MFN) and national treatment principles[32] recognizing a state's right to ban the importation of products of prison labor.[33] The WTO has publicly, albeit weakly, affirmed the importance of observance of international labor standards, while pushing the onus of the development of appropriate standards to the ILO.[34] Regionally, one can point to the formation of the NAFTA Labor Commission, charged with monitoring the national enforcement of state labor laws.[35]

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use of economic sanctions generally, see Raj K. Bhala, *MRS. WATU: Seven Steps to Trade Sanctions Analysis*, MICH. J. INT'L L. (forthcoming 1999) (proposing eponymous algorithm for evaluating sanctions measures).

30. *See* Seita, *supra* note 11, at 430 (stating that "[l]aw has been important in managing economic globalization and may become as important with respect to political globalization"); John H. Jackson, *International Economic Law: Reflections on the "Boilerroom" of International Relations*, 10 AM. U. J. INT'L L. & POL'Y 595, 596 (1995) (stating that "it is plausible to suggest that ninety percent of international law work is in reality international economic law in some form or another").

31. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 194; General Agreement on Tariffs and Trade-Multilateral Trade Negotiations (The Uruguay Round): Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125 (1994) (GATT 1947 was incorporated into the WTO as GATT 1994 in Annex IA to the WTO Agreement) [hereinafter GATT].

32. GATT, arts. I, III. *See infra* notes 109-10 and accompanying text.

33. *Id.* art. XX(e). *See infra* notes 116-18 and accompanying text.

34. *See* World Trade Organization, *Singapore Ministerial Declaration*, WTO Doc. WT/MIN(96)/DEC/W, Dec. 13, 1996, 36 I.L.M. 218 (1996) (WTO affirms commitment to international labor standards but considers ILO to be appropriate forum for trade and labor issues) [hereinafter *Singapore Declaration*].

35. North American Agreement on Labor Cooperation, Sept. 8, 1993, Can.-Mex.-U.S., 32 I.L.M. 1499 (entered into force Jan. 1, 1994); *see, e.g.*, Elizabeth M. Iglesias, *Human Rights in International Economic Law: Locating Latinas/os in the*

Finally, there has been some recognition at the regulatory level of the powerful leverage which transactional globalization places at the service of human rights reform and enforcement, at least at the level of conditions on entry into regional trading systems. For example, participation in the European Community is contingent upon membership in and observance of treaty-based human rights norms.[36] This link has also been observed, at least at the rhetorical level, in this hemisphere, in the fact that the agreements launching the Free Trade Area of the Americas cite the importance of democratic values and human rights for hemispheric integration.[37]

For these reasons, human rights advocates could view both transactional and regulatory globalization as unreservedly advancing the cause of human rights on a global level. However, due to the bifurcated nature of the international governance system into separate trade and human rights regimes, and the fact that trade law and institutions are increasingly called upon to resolve disputes involving areas outside of trade law, the globalization of markets, at least in its regulatory form, may in fact retard the effectiveness of human rights law. Disputes between trade law and other bodies of law such as human rights law which come before the institutions of regulatory globalization involve normative conflicts, in that they represent disputes between trade values and non-trade values, such as those values underlying human rights law.[38] The degree to which the law and institutions of regulatory globalization can or cannot effectively take into account these non-trade values, such as those values at stake in human rights claims and enforcement measures, is therefore going to determine to a

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Linkage Debates, 28 U. MIAMI INTER-AM. L. REV. 361, 369-71 (1997) (briefly describing treaty structure and shortcomings).

36. The link between European Community membership and participation in the European Convention on Human Rights and Fundamental Freedoms is an historic and effective example. *See* James F. Smith, *NAFTA and Human Rights: A Necessary Linkage*, 27 U.C. DAVIS L. REV. 793, 793, 817-23 (1994). This form of conditionality is a part of EC expansion doctrine as well. *Id.*; Frank J. Garcia, *"Americas Agreements"—An Interim Stage in Building the Free Trade Area of the Americas*, 35 COLUM. J. TRANSNAT'L L. 63, 63, 92-93, 102-03 (1997).

37. Garcia, *supra* note 36, at 103. However, in our hemisphere the dominant economic unit, the United States, has exerted a restraining rather than an activist impulse in this regard. *See* Smith, *supra* note 36, at 806-17.

38. *See* Nichols, *supra* note 11, at 671-89 (analyzing linkage conflicts as value conflicts).

large extent the degree to which globalization is a friend or foe to human rights.

III. REGULATORY GLOBALIZATION: UTILITY OVER RIGHTS

Understanding the adverse effects which market globalization may have on human rights requires an understanding of the changes in the way trade is now regulated through law. An increasingly globalized economy has brought many new aspects of global economic life into the ambit of trade law and trade institutions, which in turn has facilitated the further globalization of the marketplace.

A. Changes in the Global Regulation of Markets

The globalization of markets in transactional terms has been facilitated by, and has in turn facilitated, a significant change in the nature of the international regulation of economic activity. From its imperfect beginnings in the GATT 1947 to its current apotheosis in the WTO, the revolution in international economic law means that more aspects of the international economy are regulated through treaty-based rules than at any previous time, rules with less room for state discretion and unilateral action than at any prior time, and under the adjudicative supervision of stronger institutions than at any other time.[39]

One might at first, therefore, think that globalization has been an unmitigated boon for international economic law. After all, what regulatory system would not want to see the scope of its jurisdiction vastly enlarged, and the effectiveness of its norms enhanced? Because of this globalization, however, trade law is now a more complicated business. In practice, the revolution in international economic law has meant that institutions created to adjudicate trade disputes are increasingly being asked to resolve policy issues which involve not only trade law, but other issues and values as well. There have always been so-called trade linkage problems, which in practice raise questions about appropriate conditions under which states may pursue non-trade domestic policy goals such as

39. *See generally* John H. Jackson, *Reflections on International Economic Law*, 17 U. PA. J. INT'L ECON. L. 17, 21-23 (1996) (assessing Uruguay Round as "watershed shift" in international economic regulation).

national security and economic development, despite their short or long-term adverse effects on trade.[40] Now, however, trade law and trade institutions are impacting more and more areas of traditional domestic concern, such as environmental protection,[41] labor and employment standards,[42] and cultural identity.[43]

In the absence of an effective global legislative forum, trade law and institutions will, for the time being and by default, be charged with resolving difficult linkage issues involving trade values and other values, and resolving them in an adjudicative setting. The degree to which trade law and institutions are capable of adequately taking into account other non-trade interests and values at the point of conflict, will serve as the determining factor in the effect regulatory globalization has on the viability and vigor of human rights law in a global market.

B. The Normative Conflict Between International Economic Law and Human Rights Law

International human rights law and international economic law each have an important role in the implementation of a just global order, and yet the principal normative foundations of each regime are, if not incompatible, then at least in fundamental tension. The primary discipline for the analysis of international economic relations, economics, and the dominant

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40. *See* Frieder Roessler, *Domestic Policy Objectives and the Multilateral Trade Order: Lessons From the Past*, *in* THE WTO AS AN INTERNATIONAL ORGANIZATION 213 (Anne O. Krueger ed., 1998), *reprinted in* 19 U. PA. J. INT'L ECON. L. 513 (1998) (discussing antecedents of current linkage issue).

41. *See, e.g.*, World Trade Organization Appellate Body Report on United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, *available in* 1998 WL 720123 [hereinafter Shrimp Case]; Robert Howse, *The Turtles Panel: Another Environmental Disaster in Geneva*, 32 J. WORLD TRADE 73 (1998).

42. *See Singapore Declaration*, *supra* note 34 (reviewing WTO position on trade and international labor standards); Virginia Leary, *Workers' Rights and International Trade: The Social Clause (GATT, ILO, NAFTA, U.S. Laws)*, *in* 2 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FAIR TRADE? 175 (Jagdish Bhagwati & Robert E. Hudec eds., 1996).

43. *See* World Trade Organization Appellate Body Report on Canada—Certain Measures Concerning Periodicals, WT/DS31/AB/R, *available in* 1997 WL 398913; W. Ming Shao, *Is There No Business Like Show Business? Free Trade and Cultural Protectionism*, 20 YALE J. INT'L L. 105, 105 (1995).

model of international economic relations law, the Efficiency Model, are based on a set of values and an approach to normative issues which are in conflict with the values and normative approach underlying contemporary human rights law.

1. The Normative Underpinnings of Trade Law

Trade law is not simply about the exchange of goods. As is the case with all human interaction which is structured by law, trade law embodies a particular vision of justice, a theory of what constitutes the Right Order as it applies within the scope of economic law.[44] Therefore, as with any particular account of justice, a normative account of trade law presupposes a certain view of human nature, and favors a particular approach to moral reasoning.

The dominant normative account of trade law is an economic one, which Jeffrey Dunoff has termed the "Efficiency Model." In the Efficiency Model, trade law is exclusively concerned with the twin values of economic efficiency and welfare.[45] The goal of trade law is to improve the economic well-being of human beings through the facilitation of efficient exchanges.[46] This approach has several important implications for the viability of human rights law within a trade-based regulatory regime.

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44. I have elsewhere outlined the arguments in favor of this view, in an essay drawn from a larger work in progress on the problem of justice in contemporary international economic law. *See* Garcia, *supra* note 11.

45. *See* Jeffrey L. Dunoff, *Rethinking International Trade*, 19 U. PA. J. INT'L ECON. L. 347, 349-50 (1998). *See also* G. Richard Shell, *Trade Legalism and International Relations Theory*, 44 DUKE L.J. 829, 877-85 (1995) (discussing what Shell calls the "Efficient Market Model" of trade law).

46. *See, e.g.*, DAVID RICARDO, PRINCIPLES OF POLITICAL ECONOMY AND TAXATION 93 (3d ed. 1996).

> Under a system of perfectly free commerce, each country naturally devotes its capital and labor to such employments as are most beneficial to each. This pursuit of individual advantage is admirably connected with the universal good of the whole. By stimulating industry, by rewarding ingenuity, and by using most efficaciously the peculiar powers bestowed by nature, it distributes labor most effectively and most economically: while by increasing the general mass of productions, it diffuses general benefit and binds together, by common ties of interest and intercourse, the universal society of nations throughout the civilized world.

Id.; JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 8-9 (2d ed. 1989) (efficiency-based increases in general welfare are the preeminent goal of trade law).

First, there is a marked tendency for other values besides efficiency and welfare to be viewed as outside the scope of trade law, and even inimical to its purposes.[47] From the viewpoint of Efficiency Model adherents, advocates of non-trade values and issues are seen as trying to complicate the trade law system with what are at best extraneous concerns such as human rights or environmental protection,[48] and what may be at worst simply disguised protectionism.[49] In adopting this stance, Efficiency Model adherents fail to recognize that, while efficiency and welfare are undeniably important values in trade, their pursuit is necessarily part of an overarching effort to establish a just global order, an order in which other values are also central, values which are implicated and quite properly considered in trade law decisions.[50] In other words, there is no such thing as a pure trade issue.

Second, economic analysis and methodology will exert a dominant, if not overweening, influence on trade and non-trade policy formed or implemented within trade institutions operating on an Efficiency Model. In noting this consequence, I do not mean to question the relevance of economics for the purposes of trade and trade law and policy. Economics will play a critical role in trade law under *any* model, since economics involves the study of resource decision-making, and trade law

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47. *See* Nichols, *supra* note 11, at 700 ("That the trade regime gives primacy to trade is evidenced throughout the history of GATT dispute settlement, as well as in the writings of officials and scholars closely allied with the General Agreement and the nascent World Trade Organization.").

48. *See* Steve Charnovitz, *The World Trade Organization and Social Issues,* 28 J. WORLD TRADE 17, 23 (1994) [hereinafter Charnovitz, *Social Issues*] (citing objection by GATT and WTO members to efforts in 1991 and 1994 to begin work on labor and environment issues on the basis that such issues were not trade issues); Robert E. Hudec, *GATT Legal Restraints on the Use of Trade Measures Against Foreign Environmental Practices, in* 2 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FAIR TRADE?, 95, 108 (arguing that GATT has a good reason to be skeptical of linkage claims).

49. *See* Charnovitz, *Social Issues, supra* note 48, at 32 ("Simplistic demands for drastic trade remedies against so-called eco-dumping or social dumping sometimes bear a striking similarity to more conventional forms of protectionist rhetoric . . . .") (quoting then-GATT Director General, Peter Sutherland).

50. *See* Robert Howse & Michael J. Trebilcock, *The Fair Trade-Free Trade Debate: Trade, Labor and the Environment, in* ECONOMIC DIMENSIONS IN INTERNATIONAL LAW (Jagdeep S. Bhandari & Alan O. Sykes eds., 1997) (observing that "[a] visceral distrust of any or all demands for trade restrictions has impeded a careful analysis of the kinds of normative claims at issue and has allowed fair traders to characterize free traders as moral philistines").

is a powerful engine for resource allocation. However, due to the range of interests and values affected by the contemporary international economic law system, other disciplines and models are unquestionably relevant to trade policy analysis and formulation.

Moreover, in order to properly evaluate trade law's impact on human rights and other non-trade areas, it is important to remember that economics is not a value-free method of analysis.[51] Trade arguments are generally founded on some form of welfare economics, and standard welfare economics rests on strong and contestable moral presuppositions.[52] To begin with, economics employs, both descriptively and prescriptively, models and concepts which adopt a position on the nature of human beings, i.e., *homo economicus*,[53] and the appropriate ends of moral decision-making, preference satisfaction,[54] which calls into question the suitability of economics for the definitive evaluation of non-economic values.[55]

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51. In the discussion which follows, I rely heavily on Hausman & McPherson, *supra* note 6, for their analysis of the metaethics of economics.

52. Welfare economics typically translates normative questions into questions of efficiency and equity. The traditional emphasis in welfare economics on efficiency over equity may in fact reflect the perceived intractability of evaluating distributive fairness economically, rather than a clear analysis of the moral priority of efficiency over equity. Moreover, the moral implications of analysis of welfare questions into equity and efficiency issues need to be addressed from a normative perspective. *Id.* at 675.

53. Economics presupposes a model of human beings as *homo economicus*, as rational self-interest maximizers. *Id.* at 688. In the words of John Stuart Mill, political economy "is concerned with [man] solely as a being who desires to possess wealth . . . . It makes entire abstraction of every other human passion or motive." John Stuart Mill, *On the Definition of Political Economy; and On the Method of Investigation Proper to It*, 26 LONDON & WESTMINSTER REV. 1 (1836), *cited in* DOUGLAS A. IRWIN, AGAINST THE TIDE: AN INTELLECTUAL HISTORY OF FREE TRADE 180 n.1 (1996). On this view, trade is about maximizing self-interest through economic exchange, and trade law is about facilitating conditions which lead to the maximization of self-interest, by eliminating state-imposed barriers to efficient exchanges.

54. In terms of the ends of moral decision-making, economists speak in terms of individual well-being, and tend to equate well-being with preference satisfaction, and therefore the morality of an act is equated with its ability to satisfy individual preferences. *See* Hausman & McPherson, *supra* note 6, at 689.

55. However useful as an economic construct, the *homo economicus* model of human behavior is troubling when viewed as an account of moral behavior, in that it most closely resembles egoism, a much-criticized moral theory. *Id.* at 686-88. Moreover, this model does not provide a rich enough picture of individual choice to fully analyze moral behavior, for the reason that such a model precludes true altruistic reasoning and tends to assimilate moral choice into preference satisfac-

Perhaps most importantly for the purposes of this Article, the *method* of moral reasoning which normative economics adopts is a type that is fundamentally at odds with the dominant mode of moral reasoning underlying human rights law. Economic moral reasoning is consequentialist in nature, in that it focuses on outcomes, and not on procedures or acts on their own terms.[56] Consequentialism is the term for ethical theories which evaluate the rightness or wrongness of an act solely in terms of its consequences.[57] On this view, an act will be morally right if its consequences are better than those of any alternative acts.[58] Different types of consequentialist theory differ on what precisely better consequences consist of.[59]

The dominant normative account of trade law and policy is utilitarian in nature.[60] Utilitarianism is a particular form of consequentialism, which in its classical form determines the morality of an act according to its consequences for the aggregate of individual utility.[61] Forms of utilitarian ethics can be distinguished according to whether they focus on the justification of acts, which is classical or act-utilitarianism,[62] or the justification of rules which in turn justify or constrain acts,

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tion. *See id.* at 687.

56. As Hausman and McPherson put it, "[t]he standard definition of a social optimum compares social alternatives exclusively in terms of the goodness of their outcomes (rather than the rightness of their procedures), and identifies the goodness of outcomes with satisfaction of individual preferences." *Id.* In defining positive outcomes with individual preferences, it is therefore also liberal, and not communitarian. *Id.* at 675.

57. For a good introduction to consequentialism in general, see G.E.M. Anscombe, *Modern Moral Philosophy*, 33 PHIL. 1 (1958); Germain Grisez, *Against Consequentialism*, 23 AM. J. JURIS. 21 (1978).

58. *See* ALAN DONAGAN, THE THEORY OF MORALITY 52 (1977).

59. For example, welfarist moral theories take the view that consequences for aggregate individual well-being matter, with other notions such as rights or virtues serving as means to promoting welfare. *See* Hausman & McPherson, *supra* note 6, at 704. Egoism is a form of consequentialism, focusing on the outcome for the individual decision-maker. *See* R.G. Frey, *Introduction: Utilitarianism and Persons, in* UTILITY AND RIGHTS 3, 5 (R.G. Frey ed., 1984).

60. *See* RAJ BHALA, INTERNATIONAL TRADE LAW 36 (1996) (economic foundation of trade law furnishes utilitarian justifications for free trade regime); McGee, *supra* note 25, at 549 ("vast majority" of trade scholarship analyzes trade from a utilitarian perspective).

61. Put in economic terms, utilitarianism takes morality as the maximizing of some function of the welfare of individual members of society. *See* Hausman & McPherson, *supra* note 6, at 689.

62. Act utilitarianism is the classical utilitarianism of Bentham and Mills. *See* sources cited *infra* note 65.

which is rule-utilitarianism.[63] For the purposes of this article, both forms shall be taken together, and generally referred to as utilitarianism.[64] Utilitarianisms can also be distinguished on the basis of their particular theory of value, or utility. Historically, utility was defined in hedonic terms involving individual pleasure.[65] Modern utilitarianism and the economists who deploy it are more likely to define utility in terms of preference satisfaction,[66] or more generally as a form of welfarism, in which the sum or average of resulting individual welfare levels determines the correctness of an act, principle or policy.[67]

Thus from a normative perspective, the Efficiency Model of trade law asserts, explicitly or implicitly, the utilitarian argument that free trade is good *because of its consequences,* namely the maximization of aggregate individual welfare from effi-

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63. Under rule utilitarianism, a particular rule is justified along utilitarian lines, which rule must then be followed with regard to individual acts without undertaking a further utilitarian calculation for each act, unless and until the utilitarian calculus underlying the rule itself changes. *See* DONAGAN, *supra* note 58, at 193, 196-99.

64. While an oversimplification for many purposes, such treatment is defensible with regard to the subject of this article, which focuses on the effects of either utilitarianism's inherent consequentialism for human rights. *See* Frey, *supra* note 59, at 5 and *infra* note 96-97 and accompanying text.

65. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation, in* THE ENGLISH PHILOSOPHERS FROM BACON TO MILL 791, 792 (Edwin A. Burtt ed., 1967) ("By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words, to promote or oppose that happiness."); JOHN STUART MILL, UTILITARIANISM 10 (Oskar Piest ed., 1957) ("The creed which accepts as the foundation of morals 'utility' or the 'greatest happiness principle' holds that actions are right in proportion as they tend to promote happiness; wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure and the absence of pain; by unhappiness, pain and the privation of pleasure.").

66. *See* Frey, *supra* note 59, at 5 ("In recent years, however, numerous writers have moved away from a mental-state view of utility and value, on the ground that it is too confining to restrict utility to a concern with states of mind, to an interest-satisfaction view, in which 'interests' is a generic term covering a multiplicity of desires or preferences. Thus, construed as I have done here, preference-utilitarianism is classical utilitarianism with an expanded value theory."); Hausman & McPherson, *supra* note 6, at 705 ("[N]o prominent theorist now defends a hedonistic conception of utility. All of the other specifically utilitarian theorists . . . join economists in taking utility not as an object of reference, but as an index of preference satisfaction.").

67. *See* Hausman & McPherson, *supra* note 6, at 704.

ciency gains and the operation of comparative advantage.[68] Trade maximizes welfare for many reasons, including lower prices, increased consumer choice, increased employment, enhanced economies of scale, specialization, increased competition and the accelerated diffusion of the fruits of innovation.[69]

In the case of conflicts between trade-liberalizing rules and trade-restrictive measures advocated on non-trade grounds, one will find arguments in favor of free trade expressed in utilitarian consequentialist terms. For example, embargoes based on moral or national security grounds may be attacked on the utilitarian ground that it may be in a nation's best interest to trade with its enemies, because doing so will have more good effects than bad in the economic sense.[70] Trade restrictions justified on environmental grounds may encounter arguments in favor of a utilitarian evaluation of their merits, leading to a preference for market-oriented compromises with trade values.[71] In each case, the relative trade costs and regulatory benefits of a particular law or policy are weighed, and the best policy is determined to be that which, on balance, has the least trade cost or promises the greatest trade benefit.

2. The Normative Underpinnings of Human Rights Law

In contrast, human rights law is built on a fundamentally different approach to human nature and moral reasoning, which puts it in tension with the normative underpinnings of trade law. The human rights movement has undertaken to establish through human rights law a different aspect of a just global order than that undertaken in trade law, namely the protection of human dignity.[72]

The dominant contemporary discipline for the critical analysis and justification of human rights law is moral and political philosophy. While human rights in positive law can be

68. *See supra* notes 45-46 and works cited therein.

69. *See, e.g.*, JACKSON, *supra* note 46, at 10-13; McGee, *supra* note 25, at 552-54.

70. *See* McGee, *supra* note 25.

71. Richard B. Stewart, *International Trade and Environment: Lessons From the Federal Experience,* 49 WASH. & LEE L. REV. 1329, 1332, 1371 (1992).

72. "Human rights represent a social choice of a particular moral vision of human potentiality, which rests on a particular substantive account of the minimum requirements of a life of dignity." DONNELLY, *supra* note 6, at 17.

derived from and justified by a variety of theological and philosophical moral theories of human nature,[73] at the core of the concept of human rights is the notion of a transcendental standard of justice by which particular acts of the state can be judged.[74] The dominant contemporary normative justification of human rights law is some variety of Western liberalism.[75] International human rights law is essentially rooted in the liberal commitment to the equal moral worth of each individual, regardless of their utility,[76] and human rights themselves embody the minimum standards of treatment necessary in view of this equal moral worth. Moreover, human rights, the very concept of a right, and the closely associated natural rights tradition,[77] are all linked to a particular strand of liberalism, the

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73. Traditionally, there have been three approaches to establishing the existence and basis of human rights: they can be derived from God; they can be grounded in human nature and what is necessary for human beings to attain their natural end through perfection of their nature; and they can be argued to be self-evident, i.e., they can be discerned through reflection on the nature of human beings and the concept of a moral right. The latter, the so-called natural rights approach, has emerged as the most promising and widely-accepted rationale of the three, and is the rationale attributed to the UN Declaration of Human Rights and credited with their widespread acceptance. *See* H.J. McCloskey, *Respect for Human Moral Rights Versus Maximizing Good, in* UTILITY AND RIGHTS 121, 126 (R.G. Frey ed., 1984).

74. Gordon, *supra* note 1, at 694.

75. Despite this foundation, human rights advocates generally claim some form of universalism for human rights. Henkin and others claim a form of positivist universalism on the grounds that human rights instruments have been ratified by the vast majority of the states of the world. *See, e.g.,* LOUIS HENKIN, THE AGE OF RIGHTS ix (1990); Pieter van Dijk, *A Common Standard of Achievement: About Universal Validity and Uniform Interpretation of International Human Rights Norms,* 2 NETH. HUM. RTS. Q. 105, 109-10 (1995). Others claim a normative universalism for some or all human rights, either on philosophical or empirical grounds. *See* Fernando Tesón, *International Human Rights and Cultural Relativism,* 25 VA. J. INT'L L. 869, 873 (1985) (arguing that the liberal theory of justice underlying human rights is demonstrably correct across cultural lines); Christopher C. Joyner & John C. Dettling, *Bridging the Cultural Chasm: Cultural Relativism and the Future of International Law,* 20 CAL. W. INT'L L.J. 275, 297 (1990) (positing that universalism is assertable where it can be empirically shown that cultural practice does *not* in fact vary with respect to a given principle, such as the prohibition against arbitrary killing and violence).

76. DONNELLY, *supra* note 6, at 68 (following Dworkin).

77. *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 198 (1980) ("Almost everything in this book is about human rights ('human rights' being a contemporary idiom for 'natural rights': I use the terms synonymously)."); *but see* S. Prakash Sinha, *Freeing Human Rights From Natural Rights,* 70 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 342, 343 (1984) (disputing necessity or adequacy of natural rights as basis for human rights).

non-utilitarian liberalism[78] of Locke[79] and Kant,[80] which provides the normative basis for the rights set out in the various UN instruments.[81]

This model inevitably affects the human rights approach to human nature and moral decision-making, and distinguishes it from a utilitarian economic approach. The *Homo Economicus* Model of human beings presupposed in trade law places little emphasis on the precise end of human activity, assuming it to be individual well-being through the satisfaction of individually determined preferences.[82] In contrast, the Human Rights Model of human nature is obsessed with ends, in particular with the status of the human person as an end in themselves.[83] What is central about human beings is not their ability or tendency to rationally maximize their self-interest, but their intrinsic human dignity and worth. Human dignity and worth are not matters of individual preference or utility, but matters of moral duty and principle.[84] The normative arguments advanced for the protection of human rights are deontological in nature, in that they focus on principles about

78. Millsian utilitarianism, though it is a liberal theory, is a problematic theory for human rights because it is consequentialist in nature. While such a theory can illuminate the moral importance of the consequences of an act for human dignity, the theory is an inadequate justification for human rights in that it countenances consequential approaches to rights questions themselves. *See infra* notes 94-104 and accompanying text.

79. For an overview of Locke's contribution and the Enlightenment roots of contemporary international human rights law generally, see Gordon, *supra* note 1, at 711-20.

80. On the Kantian basis for international human rights, see Fernando Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53, 60-70 (1992).

81. McCloskey, *supra* note 73, at 121.

82. Instead, the inquiry concerning *homo economicus* focuses on the range of means available towards attainment of this end, and the effects of particular choices on the conditions for the satisfaction of preferences.

83. *See* Tesón, *supra* note 80, at 64 (observing that the Kantian view of international law is based on our duty to treat human beings as ends in themselves, which requires that the state incorporate respect for human rights); Baxi, *supra* note 27, at 166 (stating that "[t]he diverse bodies of human rights found their highest summation with the Declaration on the Right to Development, insisting that the individual is a *subject* of development, not its *object*.") (footnotes omitted) (emphasis added).

84. Frey notes that while the preservation of human life can be advocated on utilitarian grounds, there is no absolute bar to a change in circumstances such that killing could subsequently be justifiable on the same utilitarian calculus, thus demonstrating the unfitness of utilitarian theory as a grounds for human worth and dignity. *See* Frey, *supra* note 59, at 8-9.

how people are and are not to be treated, regardless of the consequences.[85] Deontological moral reasoning determines the rightness or wrongness of an act by the nature of the act itself, specifically whether it is in accord with or violation of certain moral principles, and regardless of the personally favorable or unfavorable consequences of the act itself. Rights are things that are valued chiefly in themselves, and not for their consequences.[86] For example, the widely-recognized international prohibition against torture[87] is justified on the ground that torture is wrong as a direct violation of human dignity, *despite* its utility, despite the fact that it might lead to information of value to the state, or deter conduct which threatens the state.[88] This is in direct contrast to the consequential form of moral reasoning which predominates in trade and in economics generally, and which at least in theory could determine torture, slavery and other human rights violations to be economically advantageous or justifiable, and hence appropriate.

The deontological nature of human rights principles also has important implications for situations in which different competing claims or values are at stake. Human dignity and moral worth, which are at the core of human rights, are expressed in absolute terms: human beings have a dignity and worth which are not subject to compromise on the basis of consequential justifications. Human rights claims "ordinarily

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85. *See* Tesón, *supra* note 80, at 71 ("Kant's international ethics follow from the categorical imperative. Just as individuals may not use human beings as mere means to an end, so foreigners, and specially foreign governments, may not use the persons that form another state . . . .").

The deontological approach is reflected in the nature of human rights themselves, and in the language of human rights instruments. For example, the Universal Declaration of Human Rights states these rights are based on the "inherent" dignity of the human person. *See* UDHR, *supra* note 2. Our constitutional tradition also echoes the sense that these rights are inalienable, that is, they cannot be separated from the human person. Regarding the U.S. approach to human rights as constitutional rights, see HENKIN, *supra* note 75, at 83-108.

86. Hausman & McPherson, *supra* note 6, at 694.

87. *See* UDHR, *supra* note 2, art. 5; Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027 (entered into force June 26, 1987) [hereinafter Convention Against Torture]; Filártiga v. Peña-Irala, 630 F.2d 876, 884 (2d Cir. 1980) (torture prohibited by "law of nations").

88. Convention Against Torture, *supra* note 87, art. 2.2 ("No exceptional *circumstances* whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a *justification* of torture.") (emphasis added).

trump utility, social policy, and other moral or political grounds for action."[89] A human rights-based claim should therefore take priority over counterclaims based in utility, and other consequentialist appeals.[90] Where human rights claims are in conflict with other sorts of claims, human rights theory dictates that human rights claims receive a very high, if not trumping, value in such processes.

3. International Economic Law and Human Rights: Normative Approaches in Conflict

What we find, then, when we examine international economic law and international human rights law, are two attempts to identify and implement the obligations which a broadly liberal theory of justice place on us in international relationships. We find the international economic law system attempting to establish a liberal view of the Right Order with regard to economic well-being, along utilitarian lines. We find the international human rights system attempting to establish a liberal view of the Right Order with regard to human dignity and worth, along deontological lines. And we find that, due to two salient facts of contemporary international life, namely globalization and a defective international governance system, these two powerful mechanisms for global justice are brought into conflict.

At the practical level, the conflict between trade law and human rights law is not, at first glance, an obvious one. Short of a trade treaty providing directly for trade in the products of prison or slave labor,[91] it is hard to imagine a direct conflict between trade law and core human rights, for example rights involving life, liberty and the security of one's person.[92] If one

89. DONNELLY, *supra* note 6, at 10 (citing Dworkin TRS 90).

90. As Donnelly puts it, "[a]s the highest moral rights, [human rights] regulate the fundamental structures and practices of political life, and in ordinary circumstances they take priority over other moral, legal and political claims." *Id.* at 1.

91. Unfortunately, history reveals that such international economic arrangements are quite possible, and theory suggests they are fully justifiable on an Efficiency Model of trade, however reprehensible they are on other terms. *See* Nichols, *supra* note 11, at 703 (referring to trade in human beings).

92. In fact, the GATT contains a provision explicitly permitting bans on trade in the products of prison labor, thus arguably reducing an incentive for the exploitation of prisoners. *See infra* notes 116, 118 and accompanying text. Of course,

considers human rights more broadly to include property rights and the rule of law,[93] it would appear that in many cases trade law is in fact working in favor of human rights, as for example when investment and intellectual property protection and increased transparency are negotiated as part of a trade agreement.

Rather, one is more likely to encounter a conflict between international trade law and measures taken at the *national* level *to protect* human rights, usually by imposing some form of economic sanction on a state engaged in rights-violating practices. When instituted between parties to a trade-liberalizing treaty such as the GATT, such measures are likely to be challenged as unlawful trade restrictions. Given the ascendancy of international economic law and its institutions, this challenge is most likely going to be brought in a trade forum, such as the WTO dispute settlement process. This interaction between regulatory globalization and the normative conflict outlined above therefore results in the prospect of a deontologically justified human rights law being challenged in, and perhaps declared invalid by, utilitarian-oriented international trade institutions.

At the meta-ethical level, there is reason for concern that in the contest suggested above, it is the human rights law which will lose. The deontological morality underlying human rights law has traditionally been recognized as difficult to reconcile with the utilitarian and other consequentialist forms of moral reasoning predominating in trade law.[94] The deontological nature of human rights render it difficult for human rights law to operate successfully within a system like the trade law system that is consequentialist in nature, because in the hypothetical conflict identified above, the trade institution will follow a normative approach committed to the possibility of sacrificing human rights protection on the basis

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here there is a strong economic rationale as well, in that it is difficult for firms employing free, compensated labor to compete with the products of unpaid prisoners.

93. *See* UDHR, *supra* note 2, arts. 6-8, 17.

94. *See* Frey, *supra* note 59, at 10 (stating that "[classical utilitarianism] is, without refinement, inimical to some claim that there are incommensurable values (such as human life)"). While preference-satisfaction utilitarianism ameliorates some of the unpleasant effects of classical utilitarianism, it is subject to the same basic criticisms. *Id.* at 13.

of the human rights measure's adverse *effects* on trade. Utilitarian theory in fact *presupposes* that determinations of human worth will involve the trading-off of one life against another.[95] To a pure act-utilitarian, the fact that a particular trade policy or trade decision violates or undercuts the effectiveness of a human right is of no consequence in itself,[96] and rule-utilitarianism is not an improvement in this respect.[97] Even if human rights are justified on rule-utilitarian grounds as useful for increasing utility, there is always the possibility that human rights as a utilitarian-based set of rules will be cast off if the utility calculus changes.[98] This must be so because utilitarianism is committed to denying the possibility of natural human rights, which people hold simply by virtue of their status as persons.[99]

In contrast, human rights law resists such tradeoffs, because the concept of a right functions to privilege certain claims against other competing claims, claims which in other contexts might overcome rights claims. It is in fact a distinctive feature of a right that it can be pressed this way.[100] Human rights by their very nature and justification are not subject to compromise in the pursuit of good consequences, and it is precisely such compromises that international economic law excels in. For this reason,[101] a utilitarian approach to trade

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95. *Id.* at 8.

96. Rights violations are of no concern to a pure act utilitarian. *Id.* at 11.

97. Though consequentialist arguments can be framed for rights, such as rule-utilitarian arguments, there remains a core content to rights that is not exhausted by their usefulness. *See* Hausman & McPherson, *supra* note 6, at 695-96. Moreover, the criticisms which apply in this regard to act utilitarianism also apply to more sophisticated forms of rule-utilitarianism. *See* McCloskey, *supra* note 73, at 124; Frey, *supra* note 59, at 4.

98. Frey, *supra* note 59, at 11 ("[F]ar from providing a persuasive case over the wrongness of killing, classical utilitarianism . . . seems perpetually to place persons and their vital interests at risk, a risk that will be realized if the contingencies fall out one way rather than another."); *see also* McCloskey, *supra* note 73, at 124 (incorporation of a rights-principle into a rule-utilitarian system, while normatively more attractive, does not insulate it from criticism). There is reason to fear that the human rights principle reaches that cast-off point precisely when enforcement would interfere with the powerful economic benefits at stake in trade decisions, when human rights are at their most vulnerable.

99. McCloskey, *supra* note 73, at 121.

100. DONNELLY, *supra* note 6, at 11-12.

101. Other critiques include the concern that utility theory is inadequate to measure gains and losses. *See* McGee, *supra* note 25, at 555, as well as the libertarian argument that there is no public interest or public good, only individuals.

cannot adequately incorporate human rights concerns based on deontologically justified rights.[102] Consequentialist, trade-off based approaches to the evaluation of trade and human rights conflicts are, in their very method of analysis, biased against human rights and place human rights at risk, in the fact that they are unwilling to accord human rights claims the sort of privilege which human rights advocates consider essential.[103] Hausman and McPherson point out that strictly deontological approaches to rights are disturbing to contemporary economists,[104] precisely because such approaches view rights as absolutely not to be violated, essentially foreclosing the sort of analysis which economists engage in when evaluating a policy or course of conduct. Yet this absolute quality which economists find disturbing about rights, is the absolute quality which human rights advocates find essential in the human rights principle.

C. *Trade-based Decisions on Trade/Human Rights Conflicts: Doctrinal Approaches to Normative Conflicts*

The theoretical risk posed to human rights law from the differing approaches to moral decision-making adopted by trade law and human rights law is borne out at the doctrinal level when one examines the approach the WTO dispute settle-

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Id. at 559.

102. *See* Frey, *supra* note 59, at 11.

> Since utilitarian reasoning can justify trade-offs . . . whenever contingencies so dictate, and since there are no person-relative principles that bar utilitarian sacrifice of persons and their vital interests within the unconstrained theory, there seems no way to deflect the risk to persons. And constraints that might deflect the risk, for example, *that a life is of inherent worth irrespective of its pleasure or capacity for pleasure, that life is an incommensurable value and so beyond the compass of utilitarian trade-offs, that this or that person-relative principle could secure persons and their vital interests from such trade-offs*, do not obviously form part of the classical theory.

Id. (emphasis added). The same basic criticism holds true for preference-satisfaction forms of utilitarianism. *Id.* at 15.

103. *Id.* at 17 (questioning whether any consequential theory can adequately account for the wrongness of fundamental rights violations such as killing).

104. Historically, arguments for capitalism were often rights-based, in that they lauded capitalism less for its efficiency-enhancing capability than for the protection of individual freedom offered by the separation of economic and political power. *See* Hausman & McPherson, *supra* note 6, at 693. However, with respect to modern economics, rights-oriented moral theories are more difficult to link to traditional forms of economic analysis. *Id.* at 672.

ment system would actually take to conflicts involving trade and non-trade values, including trade-human rights conflicts. Returning to the example first posed above of domestic trade-restrictive measures adopted at the national level against an egregious rights-violating state, this Article now assumes that such a measure has in fact been enacted. Examples of such measures might include a national-level decision to suspend GATT-obligated MFN treatment as a response to particular human rights violations,[105] the imposition by a sub-federal unit of a government procurement ban as a response to human rights violations,[106] or the imposition of a trade ban on the products of indentured child labor, either unilaterally[107] or perhaps in response to a future ILO convention prohibiting such practices.[108] The common denominator here is state action imposing a trade sanction on human rights violators, as a mechanism to both punish the state and to encourage compliance with international human rights law.

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105. For example, the much-debated Helms-Burton legislation, Title I of which is aimed at trade in goods. For a recent overview of the arguments concerning the legality of the Helms-Burton legislation under WTO law, including citations to the extensive literature on the matter, see John A. Spanogle, Jr., *Can Helms-Burton Be Challenged Under WTO?*, 27 STETSON L. REV. 1313, 1313 & n.1 (1998). For a review of the history of U.S. sanctions against Cuba, see Andreas F. Lowenfeld, *The Cuban Liberty and Democratic Solidarity (Libertad) Act*, 90 AM. J. INT'L L. 419 (1996). For an interesting analysis of the Helms-Burton legislation and its furor from an international relations perspective, see David P. Fidler, *LIBERTAD v. Liberalism: An Analysis of the Helms-Burton Act from Within Liberal International Relations Theory*, 4 IND. J. GLOBAL LEGAL STUD. 297 (1997).

106. The Massachusetts government procurement statute sanctioning Myanmar (formerly Burma) was recently declared unconstitutional as an impermissible infringement on the federal government's power to regulate foreign affairs. *See* National Foreign Trade Council v. Baker, 26 F. Supp. 2d 287, 1998 U.S. Dist. LEXIS 17789 (D. Mass. 1998). Massachusetts plans a similar law against Indonesia. *See* David R. Schmahmann et al., *Off the Precipice: Massachusetts Expands Its Foreign Policy Expedition from Burma to Indonesia*, 30 VAND. J. TRANSNAT'L L. 1021 (1997). On the matter of federal and sub-federal relations in trade law generally, see Matthew Schaefer, *Searching for Pareto Gains in the Relationship Between Free Trade and Federalism: Revisiting the NAFTA, Eyeing the FTAA*, 23 CAN.-U.S. L.J. 441 (1997).

107. The United States enacted such a ban in 1997, forbidding the importation of products "mined, produced or manufactured by forced or indentured child labor." Treasury, Postal Service, and General Government Appropriations Act of 1998, § 634, Pub. L. No. 105-61, 111 Stat. 1272, 1316 (1997).

108. The United States, among others, has been calling for such a convention. *See* President William Jefferson Clinton, State of the Union Address (Jan. 19, 1999).

1. Human Rights Trade Sanctions in the WTO

In any of these cases, the target state would challenge such actions in a WTO dispute settlement proceeding, assuming all states-parties are WTO Member States. The most likely basis for such a challenge would be that the measure violates the most-favored-nation and national treatment rules contained in GATT Articles I and III. The challenged measure would be determined a *prima facia* Article I violation, because the like products from other WTO Member States which are not targets are not subject to the trade restriction.[109] The measure is also likely to be determined a *prima facia* Article III violation, because like domestic products are also not subject to the same trade restriction.[110] Therefore, the sanctioning state is going to have to find a GATT-authorized exception applicable in such cases, or face a judgement that the measure nullifies or impairs the target state's expected trade benefits, and the likelihood of being itself subject to WTO-authorized sanctions if it fails to amend or withdraw the measure.

As the GATT treaty stands today, there is no single clearly applicable exception for such a human rights-oriented measure. There are, however, several exceptions which might apply if interpreted with human rights concerns in mind. One possible avenue is that the sanctioning state would seek the shelter of the national security exception in Article XXI. Article XXI permits states to unilaterally enact trade-restrictive measures when the state judges such measures to be "necessary for the protection of its essential security interests" during a time of "emergency in international relations."[111] However, this is a controversial provision much disliked and distrusted by the majority of WTO Member States, in that it is not justiciable as it has been interpreted.[112] Therefore, states would be reluc-

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109. *See* Philip M. Nichols, *GATT Doctrine,* 36 VA. J. INT'L L. 379, 437 & nn.333-35, panel proceedings cited therein and accompanying text (discussing elaboration and application of most-favored-nation test).

110. *See id.* at 436 nn.327, 332, the panel proceedings cited therein and accompanying text (discussing elaboration and application of national treatment test). In certain cases, the product may be so closely linked to the human rights violation that the same products are prohibited domestically. This may be the case, for example, with trade involving body parts or organs of prisoners. In such cases, there may be no underlying national treatment violation.

111. *See* GATT, *supra* note 31, art. XXI(b)(iii).

112. *See* Raj K. Bhala, *Fighting Bad Guys with International Trade Law,* 31

tant to invoke this provision absent at least a plausible national security risk, and the WTO would be very likely to oppose any effort to read that exception broadly enough to include general human rights-based trade sanctions.

A more likely candidate is Article XX, whose exceptions are intended to permit GATT violations, including Articles I and III violations, in pursuit of several categories of non-trade policy goals.[113] Three Article XX exceptions in particular, the public morals, human life and health, and prison labor exceptions, may be relevant in connection with human rights measures. Article XX(a) permits measures "*necessary* to protect human morals."[114] Article XX(b) permits measures "*necessary* to protect human, animal or plant life or health."[115] Finally, Article XX(e) permits measures "relating to the products of prison labour."[116]

The availability of these exceptions turns on two sorts of interpretive problems. First, each presents at the outset a similar textual issue, namely whether the scope of the exemption can be interpreted to accommodate human rights-based measures.[117] The prison labor exception is least likely to

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U.C. DAVIS L. REV. 1, 6-20 (1997) (critically assessing Article XXI); Spanogle, *supra* note 105, at 1328-35 (reviewing problems raised by invoking Article XXI exception).

113. As a preliminary matter, it should be noted that the availability of any of the Article XX exceptions is limited by the *chapeau* test prohibiting that measures otherwise justifiable under that article be applied so as to be "a means of arbitrary or unjustifiable discrimination . . . or a disguised restriction on international trade." GATT, *supra* note 31, art. XX; Shrimp Case, *supra* note 41 (interpreting and applying the *chapeau* test).

114. GATT, *supra*, note 31, art. XX(a) (emphasis added) (highlighting the "necessity" test). *See infra* notes 125-26 and accompanying text. *See generally* Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT'L L. 689 (1998) [hereinafter Charnovitz, *Moral Exception*] (discussing the legislative history and policy issues of this provision).

115. GATT, *supra* note 31, art. XX(b) (emphasis added) (highlighting the "necessity" test); *infra* notes 125-26 and accompanying text. Much has been written about the Article XX(b) exception in connection with trade/environment linkage problems. *See, e.g.*, DANIEL C. ESTY, GREENING THE GATT (1994); Steve Charnovitz, *Free Trade, Fair Trade Green Trade: Defogging the Debate*, 27 CORNELL INT'L L.J. 459 (1994) [hereinafter Charnovitz, *Green Trade*] (reviewing the history of trade and environmental issues).

116. GATT, *supra* note 31, art. XX(e). *See* Christopher S. Armstrong, *American Import Controls and Morality in International Trade: An Analysis of Section 307 of the Tariff Act of 1930*, 8 N.Y.U. J. INT'L L. & POL. 19 (1975) (reviewing legislative history and policy issues relating to this exception).

117. In approaching an issue of textual interpretation, the WTO Appellate Body

serve in this case, despite the fact that arguably it is the clearest case of a human rights exception in the GATT, for the very reason that it is so clearly drafted to refer to a single category of products, namely those produced by prison labor.[118] The public morality exception should apply in at least a subset of human rights-related claims,[119] but its broader applicability turns on whether the provision can be interpreted to encompass a wide range of human rights concerns beyond traditional "public morals" issues.[120] Finally, interpreting Article XX(b) to include human rights violations as threats to "human . . . life or health," would run counter to existing, albeit limited, GATT jurisprudence on this issue.[121] Second, availability of both the public morals and human life and health exceptions depends upon whether Articles XX(a) and XX(b) would be in-

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will follow the "customary rules of interpretation of public international law," DSU, *supra* note 10, art. 3.2, which the Appellate Body has determined are set out in Articles 31 and 32 of the Vienna Convention. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 311 (entered into force Jan. 27, 1988); World Trade Organization Appellate Body Report on United States—Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, *available in* 1996 WL 227476; World Trade Organization Appellate Body Report on Japan—Taxes on Alcoholic Beverages, WT/DS8/AB/R, *available in* 1996 WL 738800. This strategy promises to improve upon the uneven pattern of interpretive approaches taken by GATT panels historically. *See* Nichols, *supra* note 11, at 422-30 (reviewing panel approaches). However, the Appellate Body has itself been criticized for its uneven application of this approach. *See* Rambod Behboodi, *Legal Reasoning and the International Law of Trade: The First Steps of the Appellate Body of the WTO*, 32 J. WORLD TRADE 55, 77-78, 92 (1998).

118. GATT, *supra* note 31, art. XX(e); *but see* Stirling, *supra* note 29, at 33-39 (arguing it would be a "logical extension" of Article XX(e) to apply it to a broad range of human rights violations).

119. *See* Charnovitz, *Moral Exception*, *supra* note 114, at 729-30 (suggesting claims involving slavery, trade in weapons, narcotics, liquor and pornographic materials, religion, and compulsory labor).

120. *Id.* at 742-43 (suggesting that international human rights law be used to interpret the vague scope of the exception).

121. This author is not aware of any GATT panel in which the issue is directly raised. However, the approach taken by the panel in the Thai Cigarettes case, for example, would suggest that the provision only exempts measures aimed at products which *themselves* pose a threat to human life or health, such as cigarettes. Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes, Nov. 7, 1990, GATT B.I.S.D. (37th Supp.) at 200 (1991) [hereinafter Thai Cigarettes case]. This is consistent with the approach taken by the first Tuna panel regarding the "process/product" distinction in Article III violations, in which a measure aimed at the *process* by which a product was made would not be eligible for consideration under more favorable GATT provisions involving measures aimed at the product itself. GATT Dispute Panel Report on United States Restrictions on Imports of Tuna, 33 I.L.M. 1594 (1991) [hereinafter Tuna I].

terpreted as available for "outward-oriented" measures designed to influence the human rights policies of another jurisdiction,[122] which existing GATT jurisprudence calls into question.[123]

If none of these exceptions are available on scope or territoriality grounds, then the hypothetical human rights measure proposed above would be ruled a GATT violation. If, however, these scope issues could be resolved so as to bring human rights-based domestic measures within the ambit of either Article XX (a) or (b), then adjudication of the GATT claim would ultimately rest on the application of the "necessity" test required by the language of both articles.[124] As the test is applied, the WTO panel would rule that the disputed measure was not in fact necessary, and therefore a GATT violation, if it were to find that another less trade-restrictive measure was "reasonably available."[125]

In conditioning the availability of these Article XX exceptions, and therefore any human rights-favorable resolution of this conflict, on the necessity test, the WTO is applying what has been called a trade-off device, a term encompassing various legal techniques used in trade institutions to relate the trade burden of a given measure against its intended non-trade regulatory benefit.[126] It is in the utilization of trade-off devic-

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122. The exception for the products of prison labor does not raise this issue, as by its terms it is drafted to permit importing states to take into account the prison labor practices of other jurisdictions in deciding whether to permit or block the importation of certain products. *See* GATT Dispute Panel Report on United States Restrictions on Imports of Tuna, 33 I.L.M. 839, ¶ 5.16 (1994) [hereinafter Tuna II].

123. *See* Charnovitz, *Green Trade*, *supra* note 115, at 718-24 (discussing the distinction between "inward" and "outward" oriented measures, and disfavor towards outward-oriented measures expressed in the Tuna cases).

124. *See supra* notes 114, 115 and accompanying text. The exception for the products of prison labor does not impose a "necessity" test, requiring merely that the measure in question be one "*relating* to the products of prison labour," thereby incorporating the more lenient "rationality" test. *See infra* notes 161-62 and accompanying text.

125. *See* Thai Cigarettes case, *supra* note 121, ¶ 75 (stating that the measure is not "necessary" if there exists a less trade-restrictive alternative a state could "reasonably be expected to employ" in pursuit of its non-trade objectives); Tuna I, *supra* note 121, ¶ 5.18; Tuna II, *supra* note 122, ¶ 3.72.

126. Joel Trachtman, in his pioneering study of trade-off devices, identifies as potential trade-off devices national treatment rules, simple means-end rationality tests, necessity/least trade restrictive alternative tests, proportionality, balancing, and cost-benefit analysis. Joel P. Trachtman, *Trade and . . . Problems, Cost-Benefit*

es, and in the choice and application of a particular device, that the WTO dispute resolution system embodies the utilitarian approach to normative conflicts in trade, and in so doing raises issues about its compatibility with human rights law.

2. Trade-off Mechanisms in Trade Linkage Disputes

As a preliminary matter, it should be noted that trade-off devices have as a defining feature the willingness to juxtapose, and in many cases to commensurate between, trade values on the one hand and non-trade values on the other. Such an approach is consistent with the consequentialist approach taken by most economists and economically-minded analysts to trade matters.[127] It has in fact been said that utilitarianism is preeminently "a theory about trade-offs."[128] It should not be surprising to find such a market-oriented measure in a trade-based dispute settlement mechanism.[129]

In contrast, the very notion of trade-off devices runs counter to the deontological approach to human rights. Normatively, human rights rest on the *incommensurability* of rights, which is alien to utilitarian theories.[130] In human rights terms, one cannot morally trade a certain amount of human rights violation in exchange for a greater amount of trade welfare benefit, even if the latter is seen as enhancing or embodying other human rights. While it is foreseeable that a trade-based forum may be legally required to engage in some sort of balancing analysis, weighing the trade costs of protection against the human rights costs of acquiescence, such an analysis might be objected to by human rights advocates at the outset as simply inadequate in view of the absolute moral obligation to enforce human rights regardless of the consequences.[131] On this view, the preeminent mechanism for re-

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Analysis and Subsidiarity, 9 EUR. J. INT'L L. 32, 32 (1998).

127. Trachtman accepts as a general proposition that trade-offs must be made between trade values and other social values. *Id.*; *accord* Hausman & McPherson, *supra* note 6, at 696 (discussing Nozick).

128. Frey, *supra* note 59, at 16.

129. Indeed, Delbrück notes a preference for market-oriented strategies and mechanisms for globalization problems, where "the globalization of trade as a means of maximizing economic welfare for the greatest number constitutes the policy goal." Delbrück, *supra* note 4, at 19.

130. *Id.*

131. *See* Hausman & McPherson, *supra* note 6, at 696 (child torture example).

solving policy disputes in trade institutions by its very nature defeats the fundamental tenet of human rights law.

In thus failing to distinguish a subset of values the trade-off of which is not permitted, some may view any trade analysis as already skewed in favor of trade values over human rights values. However, it may nevertheless be inevitable that a trade-off type of analysis will be carried out in the event of regulatory conflicts, at least under the current international governance regime. Some form of balancing is often involved in policy formation: one compares two options in terms of their mutual effects on identified values, and one decides. In particular, where the dispute is not directly between trade law and human rights law, but trade law and domestic measures enacted to *enforce* human rights, it is conceivable that balancing be used in determining the appropriate or most effective *means* towards achieving the human rights goals when there is a trade cost. Any such approach, however, and in particular the trade-off device actually employed, must be carefully examined and carefully utilized in policy decisions where rights are involved, or the very nature and principle of rights can be violated at the outset. Therefore, it becomes important to evaluate each trade-off device in terms of the degree to which it discriminates against human rights. Trachtman concludes that from a trade perspective certain measures are to be preferred over others, citing in particular the necessity test.[132] It is not surprising, therefore, that from a human rights perspective, a different set of preferences emerges, in fact the opposite one.

3. The WTO Necessity Test as a Trade-off Device

Notwithstanding the argument that some sort of balancing is required in policy-formulation where competing values are at stake, the necessity test is clearly objectionable in human-rights terms as a trade-off device on the ground that it is biased in favor of trade values.[133] In other words, the test evaluates measures favorably precisely insofar as their impact on trade is the least possible, despite the fact that more trade-impacting measures might be more effective in realizing the non-trade value. Not only does this trade-off mechanism fail to

132. Trachtman, *supra* note 126, at 81-82.
133. *See* Nichols, *supra* note 11, at 699-700.

recognize the high priority which rights must hold in any policy determination, but in fact the necessity test turns this on its head, and privileges trade values over all other competing values.[134]

To a limited extent the "reasonably available" qualification invites some consideration of the effectiveness of the disputed measure in accomplishing its non-trade regulatory purpose, since any less trade-restrictive measure, which forms the basis for an invalidation of the chosen measure, must be "reasonably available" in view of the state's non-trade regulatory objectives. The extent of such consideration, however, depends entirely on the interpretation of such language, and the application of the qualification, by the GATT panel. In particular, the language clearly does not require specific consideration of the *effectiveness* of alternative measures in achieving their non-trade goals, in the way that similar language in the Sanitary and Phytosanitary Agreement does refer to the level of protection achievable by the alternative measure.[135]

Therefore, it would be consistent with the language of the necessity test as currently interpreted for a GATT panel to find that a measure significantly less effective in achieving the non-trade purpose would nonetheless be identified by the panel as "reasonably available," and therefore serve as the basis for invalidating the chosen measure. This is disturbing in that, since such a measure was in fact *not* chosen by the sanctioning state, this language would have the effect of substituting the trade forum's opinion of the rationality of alternatives for the opinion of the legislating forum.[136] If one considers that do-

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134. Thomas J. Schoenbaum has argued that the current GATT/WTO interpretation of the Article XX(b) necessity test turns the provision "on its head" in a literal sense, in that "necessary" refers syntactically to the need for protection of life and health, and not to the trade effects of the measure, and is thus wrong on textual grounds. Thomas J. Schoenbaum, *International Trade and Protection of the Environment: the Continuing Search for Reconciliation*, 91 AM. J. INT'L L. 268, 276 (1997).

135. "[A] measure is *not* more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, *that achieves the appropriate level of sanitary or phytosanitary protection* and is significantly less restrictive to trade." Agreement on the Application of Sanitary and Phytosanitary Measures, Dec. 15, 1993, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 33 I.L.M. 9, art. 5 n.3 (1994) (emphasis added). *See infra* notes 168-69 and accompanying text.

136. Also, if the test is interpreted, as it has been, to require justification not of the entire regulatory scheme but of each specific trade restrictive component,

mestic legislatures may, in principle and at least in certain cases, produce legislative outcomes "on the merits," then it is clear that the language of Article XX(a) and (b) invites the questionable substitution by a panel of trade experts, with a built-in bias favoring trade values, of a less effective human rights measure in the place of a more effective, democratically-selected, human rights measure on the basis of the measure's effects on trade.[137]

IV. PROTECTING HUMAN RIGHTS IN THE INSTITUTIONS OF THE GLOBAL MARKET: DOCTRINAL SOLUTIONS FOR NORMATIVE CONFLICTS

As a matter of justice, our society is committed to both markets and rights. Therefore, it is inevitable that there will be conflict between the rationality of markets and the rationality of rights. In many respects, the challenge facing the global community is akin to the challenge facing any society based on both markets and rights—how to carve out the respective spheres for rights and for free market choices, and how to regulate or limit the range of market choices when they threaten fundamental rights. This comes down to institutional decisions, of both a norm-creating and adjudicative nature. In other words, how do we incorporate both trade values and human rights values in comprehensive policies respecting both markets and rights, and what rules do we apply when these values, and the laws incorporating these values, conflict?[138]

The resolution of globalization/human rights conflicts in a manner which enhances the effectiveness of human rights law is going to require a mechanism for the recognition within

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then the burden is much more difficult to meet. Trachtman in fact concedes that the alternative would be much more favorable to non-trade values. Trachtman, *supra* note 126, at 69.

137. *Accord* Schoenbaum, *supra* note 134, at 277 ("this interpretation of 'necessity' constitutes too great an infringement on the sovereign powers of states to take decisions (one hopes) by democratic means so as to solve problems and satisfy their constituents"). Trachtman concedes that in this approach the characterization of the measure to be evaluated introduces "a certain degree of outcome-determinative discretion." Trachtman, *supra* note 126, at 69. This discretion is, of course, in the hands of trade policy experts.

138. The importance of mechanisms to balance the conflicts which can occur between fundamental normative elements of a globalized liberalism, such as the conflict between free markets and human rights, is recognized as one of the central challenges of globalization. *See* Seita, *supra* note 11, at 484-85.

international economic law of the priority, which at least certain fundamental human rights must enjoy. In other words, there must be some mechanism for a constitutional level of deference within international economic law toward at least certain elements of the International Bill of Human Rights, such as the core rights involving life, freedom, security and bodily integrity, and the recognition within international economic law of rights-enforcement techniques such as trade sanctions, which make such rights effective, and which cannot be balanced or traded off in international economic law dispute resolution decisions. Where some sort of trade-off is inevitable, there must be clear recognition of the priority which human rights claims must have in any value conflict.

A. Pre-empting Conflicts Among Different Sets of Rules

At the global level, resolution of the trade/human rights conflict is complicated by the defects, from a constitutional viewpoint, of international governance.[139] It is a fundamental feature of the landscape of global social policy in the late 20th century that no one institution has the effective jurisdiction to create and adjudicate norms in all aspects of global social concern.[140] Instead, we find separate treaty regimes and separate institutions, built and justified according to conflicting normative principles, yet both ultimately reflecting critical aspects of a liberal vision for global social life.

As a result, it is likely that norms affecting both human rights and trade will continue to be negotiated in the context of a treaty or treaty-making conference predominantly oriented towards one or the other of these areas of social concern. And it is likely that disputes involving both human rights and trade law will, absent modification of the existing governance mechanism, continue to be resolved in dispute resolution fora which will be constrained by treaty law and institutional paradigm to give priority to one set of concerns over another. Therefore, a natural question to consider first would be whether one solu-

139. In fact, national measures are more likely to be used in absence of international government. *See* Charnovitz, *Social Issues*, *supra* note 48, at 19.

140. For an excellent discussion of the problems which this institutional fragmentation creates in the trade/environment area, see Jeffrey L. Dunoff, *Institutional Misfits: The GATT, the ICJ & Trade-Environment Disputes*, 15 MICH. J. INT'L L. 1043 (1994).

tion might be some mechanism to either expand the scope of the WTO to include human rights norms themselves, thus bridging the regulatory chasm, or concede the institutional disjunction and limit the jurisdiction of trade institutions over human rights measures.

1. Include Human Rights Rules in Trade Agreements

It has been suggested that one approach would be the incorporation of certain human rights norms into the WTO agreements.[141] Modifying the WTO to include human rights concern is of course more attractive than the reverse, namely adding trade issues to the scope of existing human rights treaties and institutions, since the WTO is the preeminent global economic institution, with a newly strengthened enforcement system and immense international prestige. Moreover, the GATT treaty does recognize to a certain extent certain important social policy concerns based in values other than trade.[142] This approach would add to that foundation by interpreting Article XX(e) as a broad human rights exception,[143] modifying the WTO agreements to add a core list of recognized human rights,[144] and creating a specialized human rights body within the structural framework of the WTO, with authority to hear human rights related complaints and to impose trade sanctions.[145]

This approach has the benefit of reversing the current trend of institutional specialization which complicates the trade-human rights and other trade linkage issues. However, it is precisely for this reason that such an approach is unlikely to succeed, in that there does not appear to be the requisite degree of political support that such a sweeping overhaul would require. In fact, the trend seems in the opposite direction, as the majority of the world's trading nations have decided that

141. *See* Stirling, *supra* note 29, at 33.

142. However, the adequacy of the measures adopted can be questioned, as can the extent to which such concerns are recognized. Moreover, the underlying normative source of the conflict is not recognized explicitly, principally because the GATT adopts a trade values-based regulatory system. *See* Charnovitz, *Social Issues*, *supra* note 48, at 23-24.

143. *See supra* notes 117-19 (discussing the Article XX(e) exception).

144. *See* Stirling, *supra* note 29, at 39-40.

145. *Id.* at 40-45.

the WTO is not the appropriate institution to articulate human rights norms, leaving that to other specialized agencies such as the ILO.[146]

2. Limiting Trade Jurisdiction Over Human Rights Measures

Alternatively, the jurisdiction of the WTO could be limited such that the legitimacy of any human rights-related trade actions would not be adjudicated in the WTO.[147] The broadest across-the-board restriction on the WTO's jurisdiction over human rights measures would be a general exception added to either the GATT, the WTO Charter or the WTO Dispute Settlement Understanding, excluding national measures taken in response to violations of treaty-based or customary human rights from WTO review.[148] However, contrary to existing Article XX exceptions, which incorporate some form of trade-off mechanism presupposing panel review, such an exception would have to be drafted more along the lines of the national security exception in Article XXI, vesting in the sanctioning state some form of unilateral discretion in the face of human rights violations. Otherwise, human rights-based measures are not really excluded from WTO review, but privileged according to some form of trade off mechanism.[149]

An alternative approach, more limited in scope, would only apply to human rights treaties involving products which themselves embody or are the fruits of human rights violations, such as pornography and the products of indentured child labor; or to any human rights treaties negotiated in the future to expressly provide for the use of economic sanctions in response to human rights violations.[150] In such cases, the WTO

146. *See Singapore Declaration, supra* note 34.

147. This is the approach Philip Nichols advocates for linkage issues in general. *See* Nichols, *supra* note 11, at 709-12.

148. *Cf.* Kevin C. Kennedy, *Reforming U.S. Trade Policy to Protect the Global Environment: A Multilateral Approach*, 18 HARV. ENVTL. L. REV. 185, 204 (1994) (arguing that amending GATT to draft new environmental exception is the best approach to the trade/environment linkage problems).

149. Nichols seems to blur this point, in that the operation of his exemption would still require an investigation by a dispute settlement panel into the measure's purpose. Nichols, *supra* note 11, at 709-12 (positing implementation of human rights measures through modification or interpretation of the DSU).

150. This might resemble the practice under certain environmental treaties to provide for trade-restrictive measures to be taken with regard to delineated products which harm the environment. *See* Protocol on Substances that Deplete the

should be required to recognize the legitimacy of sanctions imposed within the constraints of such a treaty, and such measures should not have to undergo the necessity test as applied through the Article XX exceptions.[151] Such recognition could take the form of a pure hierarchy of norms provision, ensuring that in the event of a conflict between a trade measure and a measure taken pursuant to an obligation under such an enumerated treaty, the obligations of that treaty should prevail.[152]

There are several benefits to adopting either of these variants. First, this approach would represent the decision by the international community at the *political* or legislative level[153] that trade-related human rights measures are appropriate despite their potentially adverse trade effects. Second, either amendment eliminates the interpretive problems attendant to including human rights measures within the scope of existing exceptions.[154] Third, in its Article XXI-like form, such an exception would grant the broadest possible scope for state action, including both economic measures taken pursuant to a

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Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1550, art. 4 (entered into force Jan. 1, 1989) [hereinafter Montreal Protocol]; Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, arts. III-V, VIII 12 I.L.M. 1085 (entered into force July 1, 1975) [hereinafter Wild Fauna Convention] (both providing for the total ban of unlawful trade in covered substances, even with non-parties to the agreement). Of course, in the case of these treaties, the restrictions apply to products which themselves produce the harm.

151. The GATT already recognizes this principle in its exception for economic sanctions implemented in response to a U.N. Security Council Resolution. GATT, *supra* note 31, art. XXI(c). Particularly when one considers that such a measure would still be subject to multilateral review and constraint within its own system, such an exclusion may not be too broad for advocates of the trade system.

152. The "purity" of this proposed hierarchy of norms lies in the fact that it does not incorporate a trade-off mechanism requiring panel review, in contrast to the actual NAFTA hierarchy of norms provision, which in the case of environmental treaties imposes a necessity test on measures taken pursuant to the listed treaties. Article 104 of NAFTA states that, where there is an inconsistency between NAFTA obligations and the obligations imposed by certain listed treaties, including the Montreal Convention and the Wild Fauna Convention, *supra* note 150, the obligations under the listed treaties shall prevail to the extent of the inconsistency, provided that the Party has chosen the least inconsistent means of complying with the conflicting obligation, where the party in fact has a choice among "equally effective and reasonably available" means of compliance. North American Free Trade Agreement, Dec. 1992, Can.-Mex.-U.S., 32 I.L.M. 605 (1993).

153. On the distinction between legislative and adjudicatory approaches to the problem, see Nichols, *supra* note 11, at 691-99.

154. *See supra* notes 118-24 and accompanying text.

human rights treaty authorizing sanction, and economic measures taken unilaterally by a state in response to violations of rights which, while they are the subject of binding international custom or treaty law, are not expressly contained within instruments authorizing economic sanctions. In its narrower, hierarchy-of-norms form, such an amendment would still grant a very high level of deference to at least treaty-based human rights measures.

In granting to human rights measures an automatic exclusion from review according to trade values and trade principles, such a general exception would be quite congenial to the philosophic approach of the human rights movement, which seeks recognition of the priority of human rights claims.[155] However, the very breadth of such an approach, coupled with its preference for human rights over trade values, would make such an amendment difficult to enact in the face of concerted opposition from WTO Member States committed to a higher priority for trade values. Moreover, an Article XXI approach, or a pure hierarchy of norms, would be unpopular for its very nonjusticiability, already a concern with the existing Article XXI exception. This nonjusticiability would be resisted on formal grounds, in view of the strong preference in the WTO for rule-based adjudicative dispute resolution, and by Member States reluctant to open themselves to such broad unreviewable use of economic sanctions. Finally, such an approach would raise quite legitimate concerns over the invitation to protectionist abuse that such a blanket exception would invite.[156]

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155. Moreover, the conflict at the norm-creation stage remains less constraining, in that states are free to reach negotiated compromises between different sets of values in the creation of a treaty, in a way that treaty-based dispute settlement mechanisms are not.

156. Such an exception could still be conditioned on the *chapeau* test for arbitrary discrimination or disguised restrictions on trade, and thus would not be a blanket invitation to protectionist legislation. Adding a *chapeau*-style test would change the nature of the exception from a limitation of jurisdiction to an amendment altering the nature of the trade-off device. It may also be possible to determine a rule or metric for distinguishing "authentic" from "protectionist" invocations of such a human rights exception, as Jeffrey Atik has proposed regarding linkage issues generally. *See* Jeffrey Atik, *Identifying Anti-democratic Outcomes*, 19 U. PA. J. INT'L ECON. L. 229 (1998).

B. *Rights-deferential Trade-off Mechanisms Where Conflicts Must Arise*

Absent the implementation of a preclusionary approach such as those discussed above, one must then face the existing problem of how to adjudicate trade disputes involving human rights, where measures based on the obligations of customary or treaty-based human rights norms are at issue within trade fora which are treaty-bound to consider only trade-based factors. Therefore, the remainder of this section will focus on ways to avoid or minimize such conflicts as they might arise in trade dispute settlement fora, attempting to reconcile trade and human rights claims in a way that more accurately reflects the preeminent status which human rights claims must be afforded in policy disputes.

1. Amending the GATT to Apply a Different Trade-off Mechanism

To the extent that trade-human rights conflicts are going to be adjudicated within trade institutions, it becomes critical to revise the trade-off mechanisms which will be applied in trade dispute resolution mechanisms to better take into account human rights law and principles, while permitting the trade panel to identify and rule against disguised protectionism.

a. National Treatment

The principle of national treatment is a basic tradeoff mechanism employed by most trade agreements, including the WTO. The national treatment rule is not inherently objectionable for human rights, since it merely requires a level of consistency between foreign and domestic treatment of goods or producers with regard to any legislation, including one addressing human rights violations.[157] To begin with, in appropriate cases national treatment may be the only requirement,

157. Interestingly enough, however, Trachtman characterizes national treatment as in fact biased in favor of non-trade values and is critical on this basis. *See* Trachtman, *supra* note 126, at 72. However, from the perspective of human rights, one would expect that any trade-off mechanism employed *should* be biased in favor of human rights.

as in a ban on trade in obscene materials, in which the product itself embodies the violation. If such products are banned domestically as well, then there is no national treatment violation, and the inquiry should stop there. However, in the hypothetical case we are considering involving trade sanctions, national treatment would not be an appropriate mechanism. The measure in question would almost certainly be a *prima facie* violation of the national treatment rule, since the measure is addressed at a rights-oppressive practice that in many cases will not even be connected to the process, let alone the product, targeted by the sanction.[158] For the same reason, domestic products will not be subject to any analogous restriction. In this case, if national treatment alone were the dispositive test, then it would in fact operate as a complete rejection of non-trade values, contrary to Trachtman. Thus, while a national treatment test may be friendly or even biased in favor of non-trade values where an aspect of the product or process is in question, this rule would not work so favorably towards non-trade values in a general sanctions situation, which is likely to be more common.

In such cases, a modified form of national treatment may be indicated, focusing on the sanctioned conduct and not on the products which are the targets of the sanctions.[159] In such a case, one would want to know if the conduct which forms the basis of the sanction is also prohibited domestically.[160] For sanctions which are applied pursuant to a human rights treaty, or which have been approved by a multilateral human rights treaty-based organ, this should be enough from a trade point of view. The legitimacy of the sanction itself, if challenged, should be challenged in the applicable human rights

158. In the child labor example, however, there is a link between the embargoed product and the suspect process. Nevertheless, the product/process distinction, if carried forward into WTO jurisprudence, would be fatal to measures addressing human rights violations which arise in the production of certain products. *See* Tuna I, *supra* note 121; Tuna II, *supra* note 122.

159. The panel report in Tuna I may not be an insurmountable obstacle in this regard, in that it has been much-criticized and, in any event, was not adopted. *See* Tuna I, *supra* note 121; Charnovitz, *Green Trade*, *supra* note 115, at 723.

160. This approach would be consistent with an early draft of the predecessor to Article XX in the Draft ITO Charter, as noted by the panel in Tuna I: "exception (b) read: 'For the purpose of protecting human, animal or plant life or health, *if corresponding domestic safeguards under similar conditions exist in the importing country.*'" (emphasis added). Tuna I, *supra* note 121, ¶ 5.26.

forum, not the trade forum.

b. Rationality

Assuming human rights can come under Article XX (a) or (b) or Article XX is amended to create an additional, express human rights exception, the nature of human rights will require a more rights-deferential test than the necessity test. In the case of unilateral sanctions that are not aimed at specific products tied to the human rights abuse, it may be appropriate at the trade level to apply a simple rationality test, as a safeguard against blatantly protectionist measures.[161] Thus if there is a rational, means-end relationship between the sanction and the targeted conduct, the inquiry should stop there.[162] A trade sanction imposed against a vital export of the abusive country, with conditions for its removal clearly tied to changes in human rights practices, should satisfy such a test. A trade sanction imposed against a less significant export, but one which has a powerful domestic producer lobby, or where the conditions for removal cannot be met or have been met without the lifting of the sanction, should not meet this test.

c. Proportionality

It may be that the trade community would consider a mere rationality test inadequate, because of the omnipresent danger of disguised discrimination, and would press for a still-more trade deferential form of trade-off device such as proportionality. The proportionality test requires that the trade cost be proportionate with reference to the non-trade benefits. Trachtman cites this as deferential to a degree to non-trade values, in that it requires only that the burden be proportionate.[163] But this test seems quite biased in favor of trade values, at least in the case of conflicting human rights values, in that human rights law places a supreme value on human

161. This would be consistent to the approach taken to measures restricting trade in the products of prison labor, which face only a rationality test.

162. This would bring the language of Article XX(b) into line with the existing language of Article XX(e), which merely imposes a rationality test. *See supra* note 124 and accompanying text.

163. Trachtman, *supra* note 126, at 81.

rights, which might in fact *require* a "disproportionate" level of deference or protection. At least, it could easily appear disproportionate to trade policy experts charged with applying these rules, particularly given the bias in trade fora against deontological forms of moral reasoning. The very inalienability of human rights might suggest a disproportionality to some.[164]

2. Modifying the Necessity Test Through Judicial Interpretation

For the reasons discussed above, the necessity test as applied fails to take into account the priority which human rights-related claims must be accorded, and in fact is biased against non-trade values including human rights. However, the political factors attendant to WTO amendment and the strong, if not overwhelming, pro-trade bias of the institution and its dominant Member States, may preclude any sort of amendment substituting a potentially more human-rights deferential trade-off mechanism, leaving the necessity test in place. Therefore, if some sort of necessity test must perforce be utilized, it should be modified to grant increased deference to human rights values.

One approach would be to simply introduce such modifications into the jurisprudence of Article XX through a decision by the WTO Appellate Body. This is less formally protective than an explicit amendment of the language, but is certainly procedurally more readily attainable.[165] A logical place to consider

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164. Ultimately, such measures would not be ruled disproportionate if the forum recognizes the priority of human rights to a sufficient degree that the resulting trade burden would be considered appropriate. But this depends entirely on the trade forum's characterization of the importance of the value being protected by the legislation in conflict. Is it appropriate for democratically-enacted human rights laws to be subject to this sort of evaluation by an independent body of trade policy experts? *See generally* Robert F. Housman, *Democratizing International Trade Decision-making*, 27 CORNELL INT'L L.J. 699 (1994) (presenting a critique of the anti-democratic nature of trade institutions).

165. The effectiveness of these approaches would, of course, depend on the precedential effect of WTO appellate body rulings. To the extent that the emerging doctrine of *stare decisis* in WTO decisions continues to evolve, such approaches may be equally as effective as formal amendments, and more readily attainable. *See* Raj K. Bhala, *The Myth About Stare Decisis and International Trade Law*, 14 AM. U. J. INT'L L. & POL. (forthcoming 1999); Raj K. Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication*, 9 J. TRANSNAT'L L. & POL'Y (forth-

an interpretive amendment would be in the application of the existing "reasonably available" qualification. The most rights-protective interpretation would stipulate that, in order for the existence of a less trade restrictive alternative to invalidate a human rights measure, it must be shown that the less restrictive alternative is *equally effective* in terms of its impact on the human rights abuse in question. So interpreted, the WTO necessity test would resemble the necessity test embodied in the NAFTA's hierarchy of norms provision.[166]

A somewhat less rights-protective approach would be to interpret the necessity test in Article XX to conform to the necessity test as established in the Sanitary and Phytosanitary Agreement, which requires that a less restrictive measure be both "significantly" less restrictive, and disqualify the challenged measure only if it meets the "appropriate" level of protection.[167] This is clearly not as strong as the NAFTA test, since an "appropriate" level may be somewhat less than the "equally effective" level. However, it is still an improvement over the necessity test as currently interpreted, and should be the minimum standard applied to any less effective but more trade-friendly human rights measure at the panel level, since to find such a measure reasonably available without any consideration of such effects would be to utterly subvert both the judgement and the regulatory aim of the state. If coupled with procedural reforms allowing amicus briefs, panelists with non-trade expertise, or other forms of participation by the human rights community,[168] such an amendment would put non-trade values more on a par with trade values in any Article XX (a) or (b)-based proceeding.

V. CONCLUSION

The linkage debates currently underway in trade law and policy reveal to us that international economic law is funda-

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coming 1999); Rutsel Silvestre J. Martha, *Precedent in World Trade Law*, 64 NETH. INT'L L. REV. 346 (1997).

166. *See supra* note 152.

167. *See supra* note 135 and accompanying text.

168. *See* Shrimp Case, *supra* note 41, ¶¶ 89-91; Philip M. Nichols, *Extension of Standing in World Trade Organization Disputes to Nongovernment Parties*, 17 U. PA. J. INT'L ECON. L. 295, 328-29 (1996) (arguing that panel composition should be changed to include appropriate non-trade experts).

mentally about justice, as are human rights law and other linkage issues. Therefore, conflicts between the regulatory infrastructures of globalization and international human rights must be analyzed and approached as justice questions. In practice this means paying attention to the decision-making process employed in such conflicts, in that it reflects a process of moral reasoning about issues of justice, and is not simply an exercise in identifying trade-liberalizing and trade-restrictive practices.

Ultimately, the effect of globalization on the recognition, protection and enforcement of human rights is going to depend on the relationship between international economic law, which provides the institutional and regulatory framework for globalization, and the international law of human rights. The issue is complicated by the overlapping jurisdiction of both international economic law and international human rights law over the same geographic and social space. Each regulatory system has been built according to, and operates on, fundamentally different, even conflicting, normative assumptions. Thus the institutional mechanisms developed to establish norms and resolve disputes in the context of overlapping jurisdictions and conflicting values will in practice determine whether globalization proves to be a friend or foe to human rights. From the above it is evident that absent significant reforms, trade law, and the forms of economic analysis underlying it, are inadequate for the just resolution of conflicts involving human rights law in a global market, at least if one considers human rights to hold a privileged position in law and policy. The changes suggested above, while they undeniably reflect a social decision in favor of the human rights principle over, or at least on a par with, conflicting trade interests, are in line with our domestic stance on such issues. If we have taken a position in our domestic constitutional orders that fundamental rights are not subject to unfettered balancing and compromise, then there is no principled reason to reach a different conclusion in the international arena. Of course, one can still differ as to the best means towards this end, and consequential forms of analysis are useful in identifying favorable approaches. However, the end must be clear, and not open to accommodation.

It has been suggested that, paradoxically, the greater the potential threat to human beings and their vital interests posed by utilitarian reasoning, the greater the perceived need

for rights-based theories.[169] If so, this might lead one to be optimistic that some version or combination of the reforms outlined above might be adopted in the next stage of WTO evolution. Absent such changes, market globalization, in its institutional and regulatory form as the international economic law of today, could mean the triumph of utilitarian approaches to values over deontological ones, and therefore the triumph of trade over human rights. The trade system as it is now constituted is normatively incapable of properly evaluating linkage decisions because its very approach signals a defeat of fundamental non-trade values. At a minimum, this means that to the extent that trade institutions are called upon to resolve issues involving trade values and other values such as those underlying human rights law, the utilitarian approach underlying trade values will lead to decisions which are fundamentally skewed in favor of trade over other values at stake. This is not a victory for trade, but a defeat for our efforts to establish a just global order.

169. Frey, *supra* note 59, at 18.